

APPLICANTS:
Robert B. and Catherine Carter
and Bren Mar I, LLC

REQUEST: Rezone 72.83 acres from
AG to MO District (Case No. 118) and
rezone 35.04 acres from AG to MO District
(Case No. 119)

HEARING DATE: August 30, 2006

BEFORE THE
ZONING HEARING EXAMINER
FOR HARFORD COUNTY
BOARD OF APPEALS
Consolidated Case Nos. 118 & 119

ZONING HEARING EXAMINER'S DECISION

APPLICANTS: Robert B. and Catherine Carter (Case No. 118)
Bren Mar I, LLC (Case No. 119)

CONTRACT
PURCHASER: 95-543, LLC

LOCATION: northwest of MD Route 543, near I-95, North of Belcamp, Maryland

PRESENT
ZONING: AG / Agricultural

REQUEST: Case No. 118 – A request pursuant to Section 267-12A of the Harford County Code, to rezone 72.83 acres from AG District to MO District.

Case No. 119 – A request pursuant to Section 267-12A of the Harford County Code, to rezone 35.04 acres from AG District to MO District.

TESTIMONY AND EVIDENCE OF RECORD:

For the Applicant first testified Kevin Carney, who identified himself as a developer of the two parcels which are the subjects of these consolidated cases. The first property is a 35.04 acre parcel, owned by Bren Mar I, LLC; the second property is a 72.03 acre parcel, now owned by Robert B. and Catherine Carter. These properties adjoin one another and, as identified by the Staff Report, are located at the northwest corner of Maryland Route 543 and the I-95 interchange, on the west side of Creswell Road.

Mr. Carney identified the present zoning of both parcels as agricultural. He seeks a zoning of MO/Mixed Office.

In support of his request Mr. Carney identified a Concept Plan which shows potential uses of the parcels, if the requested zoning is granted, of mixed office, retail and hotel. According to Mr. Carney the parcels could be developed with up to 850,000 square feet of office space, including ancillary services, along with two hotels and a restaurant.

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During the 2005 County-wide comprehensive zoning process, the Applicants had requested the parcels be given a B3 zoning as the MO/Mixed Office zoning district had not yet been created by the Harford County Council. The Department of Planning and Zoning and Planning Advisory Board recommended the property remain AG but noted that consideration should be given to MO should a MO zone be created. (See Applicants' Exhibit 23). In December 2005, the Harford County Council created an MO zoning classification. (See Applicants' Exhibit 21).

As a result, the Harford County Council voted to give the parcels a MO/Mixed Office zoning classification. This comprehensive plan was subsequently vetoed by County Executive Craig. As a result, the parcels retain their agricultural zoning.

Upon being questioned by neighbors, Mr. Carney stated that a traffic study will eventually be done. There will most likely be a light at Creswell Road with some widening of Route 543, and with designated left and right turn lanes established. Mr. Carney explained that he had met with some of the residents of the area in order to explain the project.

Next testified Edward B. Lassahn, a principal with Morris & Ritchie Associates. Mr. Lassahn was offered and accepted as an expert in site plan design and water and sewer issues.

Public water and sewer is available, although not within a planned service area. A request has been made to include the parcels in the planned service area. According to Mr. Lassahn, the County Council deferred a decision on including the parcels in the planned service area until they had been given a MO zoning designation. (See Applicants' Exhibit 27). Mr. Lassahn feels that the property will be accepted once the proper zoning is obtained.

Mr. Lassahn also noted that the provision of water and sewer services to the subject properties will not open up the area for additional expansion of water and sewer service. He noted that the legislation creating the MO zone provides that the extension of utilities are not to form a basis for expanding the development envelope.

Next testified Chris Henn, President of the Riverside Community Association. Mr. Henn stated that the Riverside Community Association is in favor of the request. The Association likes the idea of only one developer for the two parcels. The Association believes this will result in more uniform development, one which will be more acceptable to the community.

Next testified Sean Davis of Morris & Ritchie Associates. Mr. Davis was offered and accepted as an expert in planning and zoning and land use matters. He finds the history of the property as described in the Staff Report as accurate.

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Mr. Davis explained that the 1996 Harford County Master Land Use Plan designated the property as “MO/Mixed Office”. This designation was intended to promote major economic development activities and was limited to two locations – I-95/Route 543 (the subject parcels), and I-95/Maryland Route 22.

In 1997 the parcels were given an agricultural zoning. In December 2005 the Council created the MO/Mixed Office use designation. Mr. Davis is of the opinion that agricultural zoning is not consistent with an MO land use designation.

Mr. Davis feels it was a mistake to have zoned the property agricultural in 1997 with the land use as designated on the Land Use Plan at that time as Mixed Office. The property should have been given a zoning designation which was more compatible with Mixed Office, even if the Mixed Office designation had not yet been enacted. Agriculture is clearly not compatible with Mixed Office zoning. He believes that with the County Council having now enacted Mixed Office legislation, the MO zoning is now the most appropriate classification for the property. It is consistent with the Master Land Use Plan.

Mr. Davis identified the neighborhood of the parcels as that encompassed by Jones Run, Creswell Road, and Cullum Road along Bush River. This differs slightly from the neighborhood as delineated by the Harford County Department of Planning and Zoning.

Mr. Davis believes the neighborhood has changed since 1997. These changes include the adoption by the Harford County Council of the Mixed Office land use designation in the year 2005, and the implementation of the Base Realignment Closure Process (“BRAC”).

Mr. Davis emphasized that B3 zoning was requested by the Applicant in the year 2005 because MO zoning had not yet been created. The Council subsequently created the MO zoning category, and a MO designation was accordingly recommended for the property by the Department of Planning and Zoning and the Planning Advisory Board.

Next testified Anthony McClune of the Harford County Department of Planning and Zoning. The Department’s description of the neighborhood is somewhat different from that of the Applicant. Mr. McClune and the Department believe that the neighborhood is that bordered by Maryland Route 136 and Jones Run to the west; Maryland Route 543 and Creswell Road and Cullum Road to the east; Otter Point Creek, Church Creek and Bush River to the south.

Mr. McClune explained that agricultural zoning was originally given to the parcels in 1982. They remained in this agricultural zoning category through the 1997 Comprehensive Rezoning although the property was designated “MO” on the 1997 Master Land Use Plan. In 2005 the Applicants requested B3 zoning because the MO zoning classification had not yet been enacted by the Council. The Council subsequently enacted MO zoning, and then subsequently voted to apply MO zoning classification to the subject parcels. Since that Comprehensive Zoning bill was vetoed by the County Executive, the current zoning remains agricultural.

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Mr. McClune and the Department see no substantial change in the neighborhood since the time of the 1997 Comprehensive Zoning. The BRAC process has just begun and no substantial change has occurred as a result in either the County or in the neighborhood. The Department accordingly does not believe that the enactment of the MO zoning is a significant change in the neighborhood so as to justify rezoning.

However, the Department agrees that a mistake occurred when the agricultural zoning of the property was maintained during the 1997 Comprehensive Zoning. The Department believes that since a MO land use designation was applied to the properties in 1996, a zoning category more in conformance with MO should have been applied. Agriculture was not an appropriate or correct land use designation in 1997.

Mr. McClune and the Department now recommend MO/Mixed Office zoning for the properties.

Next in opposition testified Grant Walter. Mr. Walter is against the proposed request as he believes the granting of MO zoning to the parcels will result in significant expansion of business uses in the neighborhood. Mr. Walter also believes that these properties should not be rezoned on a piecemeal basis. They should be zoned as part of a Comprehensive Plan.

Next testified Mr. Fitzwater in opposition. Mr. Fitzwater is concerned about traffic impact and the impact on the value of his property.

Next in opposition testified Mary Jane Richardson. Ms. Richardson's property is across Creswell Road from the subject property. She is concerned about the impact of the rezoned parcels on traffic. She is unable to get onto Creswell Road on occasion from her property. Traffic on Route 543 is very heavy.

No other witnesses testified, nor was any additional evidence presented.

APPLICABLE LAW:

Section 267-12 A. Zoning Reclassifications States:

"A. Application initiated by property owner.

(1) Any application for a zoning reclassification by a property owner shall be submitted to the Zoning Administrator and shall include:

(a) The location and size of the property.

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- (b) *A title reference or a description by metes and bounds, courses and distance.*
- (c) *The present zoning classification and the classification proposed by the applicant.*
- (d) *The names and addresses of all persons, organizations, corporations or groups owning land, any part of which lies within five hundred (500) feet of the property proposed to be reclassified as shown on the current assessment records of the State Department of Assessments and Taxation.*
- (e) *A statement of the grounds for the application, including:*
 - [1] *A statement as to whether there is an allegation of mistake as to the existing zoning and, if so, the nature of the mistake and facts relied upon to support this allegation.*
 - [2] *A statement as to whether there is an allegation of substantial change in the character of the neighborhood and, if so, a precise description of such alleged substantial change.*
- (f) *A statement as to whether, in the applicant's opinion, the proposed classification is in conformance with the Master Plan and the reasons for the opinion."*

The Applicant requests a change in the zoning of the property. In determining whether any such request should be granted;

"It is presumed that the original zoning was well planned, and designed to be permanent; it must appear, therefore, that either there was a mistake in the original zoning or that the character of the neighborhood changed to an extent which justifies the amendatory action." See Wakefield v. Kraft, 202 Md. 136 (1953).

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It is a “rudimentary” principle of zoning review that there exists a:

“ . . . strong presumption of correctness of the original zoning and of comprehensive rezoning to sustain a piecemeal change. Strong evidence of mistake in the original zoning or comprehensive rezoning or evidence of substantial change in the character of the neighborhood must be produced.” See Stratakis v. Beauchamp, 268 Md. 643 (1973).

See also Hardesty v. Dumphy, 259 Md. 718 (1970).

Furthermore, legally sufficient evidence must exist to show “substantial change” in the character of the neighborhood, and not a “mere change” which may very well fail to rise to the level of legally sufficient evidence to justify a finding of change in the neighborhood. See, generally, Buckel v. Board of County Commissions of Frederick County, 80 Md. App. 05 (1989).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

These two parcels in combination total approximately 107 acres. They lie in the northwest quadrant, and in fact compose the northwest quadrant, of the Maryland Route 543 and I-95 intersection.

Their potential importance to the economic development of Harford County was obviously acknowledged by the Harford County Council in 1996 when it created a “Mixed Office” land use designation and subsequently applied this designation to the subject parcels in the 1997 Master Land Use Plan. Mixed Office use under the Master Plan is defined as follows:

“Areas designed to promote major economic development opportunities such as corporate offices, research and development facilities, and high tech services, which create significant job opportunities and investment benefits. This area may also include limited retail use to service the employment center. Designated at strategic I-95 interchanges, development will be subject to specific performance, architectural and site design standards.”

However, even though the parcels had been given a MO land use designation in 1997, the County Council did not at that time, for unexplained reasons, actually legislate an MO/Mixed Office zoning classification. Accordingly, during the 1997 comprehensive rezoning process the parcels were not given a MO/Mixed Office zoning classification. In fact, their zoning did not change in 1997, and they remained zoned agricultural.

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The Harford County Master Land Use Plan was revised in the year 2004. The subject parcels continued to retain their MO/Mixed Office use designation on the 2004 Master Land Use Plan, although their zoning classification continued to be agricultural.

This somewhat unusual state of affairs continued until 2005 when Harford County was in the process of completing the 2005 comprehensive rezoning. Obviously, the Harford County Council attempted to rectify its apparent oversight in 1997, as it enacted by legislation a MO/Mixed Office zoning classification. In 2005 this land use designation was applied to the subject parcels by Council action during the 2005 comprehensive zoning process. The Harford County Department of Planning and Zoning also concurred in giving the subject parcels an MO zoning classification.

However, in a way which was obviously unforeseeable, County Executive Craig vetoed the comprehensive zoning legislation. The veto was not overridden. As a result, today the parcels continue to be designated as MO/Mixed Office on the Master Land Use Plan, but they continue to retain an agricultural land use classification. The Applicants have filed the instant applications in order to rectify what they believe is a mistake.

In support of the request the Applicants make two arguments.

The first argument is that there has been a change in the neighborhood since the time of the last applicable rezoning, which would have been the 1997 rezoning, so as to justify a change in zoning from agricultural to MO/Mixed Office. In support of this argument the Applicants suggest that the beginning of the implementation of the BRAC process, and the creation of a MO zoning classification, are sufficient facts so as to justify a finding of a change in neighborhood. The Applicants' argument in this respect, however, is not persuasive. The BRAC process is only just beginning and, while there has been a great deal of discussion and County-wide excitability in anticipation of potential impact, there has been little if any actual physical consequence. As a result, at least to date, there has been little identifiable County-wide change as a result of BRAC, and certainly no change within the neighborhood of the subject parcels.

The second argument is that a finding of change can be based upon Harford County's enactment of legislation which creates a MO land use classification. This argument is similarly rejected. The creation of a map designation can in no way rise to the level necessary to support a finding of actual change in the neighborhood. It is accordingly found to be no change in the neighborhood as a result of this new land use classification.

The Applicants' argument of mistake in original zoning is more persuasive. There is no question that the Harford County Council in 1996 created a Master Land Use Designation which had only a limited applicability. By its definition, a Mixed Office designation was to be "designated at strategic I-95 interchanges. . ." Obviously, Harford County only has a few I-95 interchanges, and the subject parcels are located at one of them.

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The definition of Mixed Office as now contained in the 2004 Master Land Use Plan also seems to fit the type of use which the Applicants represent will be applied to the subject property. Accordingly, it can be seen that for almost 10 years the Harford County Council has envisioned a MO/Mixed Office land use designation to be applied to at least certain properties around I-95 intersections, including the subject parcels.

Despite this designation, nothing was done to actually create a land use classification in the 1997 comprehensive zoning process, and while a map classification was created in 2005, it was not successfully applied to the subject parcels. The Applicants are now the beneficiaries of a Master Land Use Plan designation, but do not have an actual map classification to conform to that designation.

The Applicants' argue, as they must, that the mistake was made in 1997 in not providing a map classification that, if not MO, was at least more in conformity with the MO/Mixed Office Master Land Use Plan designation. In any event, they argue, it was clearly a mistake, in light of the language of the MO land use designation, to continue the subject parcels in an agricultural classification.

The Department of Planning and Zoning staff supports this mistake argument of the Applicants, as does the Harford County Planning Advisory Board.

Perhaps most importantly, the action of the Harford County Council in 2005, which actually applied a map designation of MO to the subject parcels only to have the overall comprehensive plan vetoed by County Executive Craig, cannot be ignored.

Accordingly, and for the above reasons, it is found that the Applicants have met their burden of showing a mistake in the 1997 comprehensive zoning in that the Harford County Council failed to apply a map designation to the subject property which was more in conformity with a MO/Mixed Office classification. The Council should have, in 1997, zoned the property to a higher and more intense use which would have been more consistent with the land use designation of MO/Mixed Office.

Having found a mistake does not necessarily mean, however, that the parcels should be granted a MO land use designation. Nevertheless, in light of the above, it is clear that a MO land use classification is the only appropriate land use designation for the subject parcels.

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CONCLUSION:

It is accordingly found that a mistake was made in the zoning of the subject parcels in 1997, and that the request to rezone the subject parcels from AG/Agricultural to MO/Mixed Office be approved.

Date: October 17, 2006

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on NOVEMBER 15, 2006.